Nos. 183, 186, 187

# In the Supreme Court of the United States

OCTOBER TERM, 1942

THOMAS J. PENDERGAST, PETITIONER

*v.*

UNITED STATES OF AMERICA

ROBERT EMMET O'MALLEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

A. L. MCCORMACK, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT*

## BRIEF FOR THE UNITED STATES

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## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinion of the circuit court of appeals (R. 1188) is reported in 128 F. (2d) 676. The opin-

ions of the district court (R. 21, 50) are reported in 35 F. Supp. 593, and 39 F. Supp. 189.

## JURISDICTION

The judgments of the Circuit Court of Appeals were entered June 1, 1942 (R. 1212–1214). The petitions for certiorari were filed on June 27 and 29, 1942, and granted on October 12, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

1. Whether petitioners' conduct constituted misbehavior in the presence of the court, within the meaning of Section 268 of Judicial Code, 28 U. S. C., Sec. 385.

2. Whether the proceeding for contempt is barred by the three-year statute of limitations (R. S. § 1044, 18 U. S. C. 582).

3. Whether the proceeding for contempt is barred by an alleged agreement with the District Attorney.

4. Whether the three-judge district court had jurisdiction to pass upon the contempt charge.

## STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 56–64.

## STATEMENT

Petitioners were found guilty of criminal contempt by the District Court of the United States

for the Western District of Missouri (R. 65–66, 39 F. Supp. 181). Their contempt consisted in the execution of a scheme to procure fraudulently from the district court the settlement of certain insurance rate litigation then pending before it, and the distribution of funds impounded by the court in the course of that litigation. By securing the sanction of judicial authority for the collusive settlement which they presented, petitioners attempted to avoid a proper judicial determination as to the validity of a proposed increase in fire insurance rates and as to the ownership of the funds theretofore impounded by the court.

The scheme was conceived and executed under the direction of four persons—Charles R. Street (now deceased), an insurance company executive, who was in charge of the rate litigation for the insurance companies; petitioner Pendergast, a political boss with almost dictatorial power, residing in Kansas City, Missouri; petitioner O'Malley, an "agent" of Pendergast, who as Superintendent of the Missouri Insurance Department was the defendant in the insurance rate cases; and petitioner McCormack, an insurance agent residing in St. Louis, Missouri (R. 51–52, 653, 1189).

Each of the four conspirators assumed a distinct role in planning and carrying out the scheme. Street, representing the plaintiff insurance companies (R. 700, 651, 653), hired Pendergast to use his political power and control over Superintendent O'Malley (R. 704–705, 654, 52, 1189), and to

bribe the latter (R. 709–710, 713–715, 663, 52, 1189), to agree to a settlement of the insurance rate cases which would be satisfactory to the insurance companies (R. 704, 654). Street agreed to pay Pendergast a "fee" of $750,000 to accomplish this result (R. 705–706, 631, 654, 1123, 52, 1189). Of this sum he had actually paid $440,000 on account before the scheme was frustrated (R. 706–709, 711–712, 716–717).

Petitioner Pendergast both through his influence with O'Malley, and by payment of $62,500 as a bribe (R. 709–710, 713–716, 782–785, 1123–1125, 52), caused O'Malley to agree to a "settlement" whereby the insurance companies would receive an increase of 13⅓ percent in rates, and would receive 80 percent or about $8,000,000 of the impounded premiums, and the policyholders would be deprived of their opportunity to have the court determine the validity of the rate increase and their right to the $10,000,000 fund (R. 724–725, 890–894, 1118, 52, 1189).

Petitioner O'Malley as Superintendent of Insurance, and as defendant in the rate cases, accepted the bribe (R. 709–710, 714–715), and in consideration thereof (R. 632) betrayed the interests of the policyholders whom he represented, by corruptly agreeing to a settlement "satisfactory" to his adversary, Street (R. 704, 890–894, 654).

Street and petitioner O'Malley, in furtherance of the conspiracy, caused their respective counsel, representing the parties in the rate cases, to appear

in open court and, by representations there made, to induce the district court to enter decrees carrying the corrupt settlement into effect (R. 891–892, 633, 984, 985, 987, 988, 990, 1006, 963, 968, 969, 971, 974, 976–977).

Petitioner McCormack, as go-between, carried installments of cash, aggregating $440,000, from Street to Pendergast (R. 706–709, 711–712, 716–717), and $62,500 of this cash as a bribe from Pendergast to O'Malley (R. 709–710, 713–715). At O'Malley's request he secreted the bribe money in a safe deposit box in St. Louis; from time to time, also at O'Malley's request, he delivered the cash to him (R. 709–710, 713–715); and subsequently, when testifying as a witness before a federal grand jury, again at O'Malley's request (R. 719, 721–722) he attempted to protect the conspirators from exposure by suppressing his knowledge of the corruption (R. 718).

The material facts arranged in chronological order, are as follows:

On December 30, 1929, several insurance companies doing business in Missouri filed with the then Superintendent of Insurance of that State an increase of 16⅔ percent in insurance rates (R. 373–374, 413, 443–444, 498–500, 646), which the Superintendent on May 28, 1930, denied (R. 417–418, 446). The insurance companies instituted in the district court 137 separate injunction suits against the Superintendent of Insurance and the Attorney General of Missouri (R. 363–364), in

which they prayed interlocutory and permanent injunctions suspending or restraining the enforcement of certain statutes of Missouri, by restraining the action of those state officials in the enforcement of the statutes and in the enforcement of the Superintendent's order of disapproval of the increase in rates made pursuant to said statutes, upon the ground of the unconstitutionality of the statutes (R. 382–399, 404–407, 408–409, 409–412, 420–421, 432, 436–437, 460–470, 472–475, 485–487, 490–491, 492–494, 494–497). The statutes thus attacked were Sections 6270, 6274, 6281, 6287, and 6311 R. S. Mo. 1919, and Section 6283 R. S. Mo. 1919, as amended, Laws of Missouri 1923, p. 234. (These statutes are copied in the appendix.)

A three-judge court was accordingly convened pursuant to Section 266, Judicial Code, 28 U. S. C., Sec. 380. The applications for interlocutory injunctions were presented to the court and were granted on July 2, 1930 (R. 501–508), and the Superintendent and Attorney General were thereby enjoined, pending final decisions of the cases, from enforcing the statutes (R. 503, 504), upon condition that the insurance companies deposit the amount of the increase in rates with a custodian of the court to await ultimate decision of the cases (R. 505–508). A special master was appointed on Sept. 22, 1930, to take the evidence and report it to the court (R. 602).

During the pendency of the lengthy proceedings before the master, the premiums impounded by the

court continued to accumulate until, by the spring of 1935 about $10,000,000 was in the custody of the court. At that time, O'Malley, through McCormack, suggested to Street that he talk with Pendergast about a settlement of the cases (R. 699, 700, 651, 653, 654). Pendergast was not a lawyer (R. 653) or a party to the insurance cases (R. 365, 416, 435), and could have had no legitimate connection with those cases. Street was willing to meet Pendergast (R. 702, 654), and O'Malley arranged a time for them to meet in Chicago (R. 702, 703, 654). At this meeting Street, McCormack and Pendergast were present (R. 703). Pendergast was there, not to discuss settlement of the rate cases, but to convince Street that he could conrol O'Malley, and to obtain from Street an agreement to pay him for doing so (R. 704, 654). Street agreed to pay a "fee" of $500,000 if a "satisfactory settlement" could be obtained (R. 704, 654). This was later raised to $750,000 (R. 705–706, 631 654). Pendergast said he "would see what he could do about it" (R. 705), and later reported that he was "working on the matter" (R. 706).

Street then sent McCormack to Pendergast with $100,000 in currency, which was divided, $55,000 to Pendergast, $22,500 to O'Malley, and $22,500 to McCormack (R. 706–710). O'Malley knew the payment to him was for the "settlement" he was to make (R. 632).

Thereafter on May 18, 1935, Street and O'Malley, accompanied by their respective attorneys, had a

conference at the Hotel Muehlebach in Kansas City, and there discussed the "details of what could be done with reference to bringing about the settlement agreement" (R. 724, 662). They made and signed a written memorandum of agreement (R. 890–894, 1118), which provided that O'Malley as Superintendent would approve (as of June 1, 1930) 80 percent of the increase in rates sought by the insurance companies (R. 891); "that the parties will by their attorneys appear in both the United States Court and in the Circuit Court of Cole County and join in seeking appropriate orders from such courts for distribution of impounded money," 20 percent to the policyholders, 50 percent directly to the insurance companies and 30 percent to Charles R. Street and Robert J. Folonie as trustees for the insurance companies (R. 891–892).[1] These trustees were to account therefor to the companies, but not to the court or Superintendent (R. 892). The agreement provided that the insurance companies would "take the appropriate means to present to the courts in which proceedings are pending" the agreement of settlement; that O'Malley as Superintendent would "appropriately confess the same and consent to decrees for distribution of impounded moneys" (R. 892–893); and that the companies and O'Malley would "mutually

[1] Companion litigation was pending in the Circuit Court of Cole County, Missouri, instituted by other insurance companies than those which had sued in the district court; and this explains the reference to the state court in the settlement agreement.

undertake to join in seeking orders or decrees confirming their agreement" (R. 893). To effectuate the settlement it was necessary to obtain decrees of the court directing distribution of the impounded funds (R. 632, 680).

On June 18, 1935, the insurance companies accordingly filed, in each case pending in the district court, a motion reciting terms of settlement and praying an order of distribution in accordance therewith (R. 603–606, 663). On the following day the insurance companies and O'Malley filed in each case a stipulation agreeing that the district court should make such order of distribution (R. 607–609). The written memorandum of May 18 was never shown to the court (R. 680).

On June 22 and October 26, 1935, and on January 24, 1936, hearings in open court were had on the foregoing motions (R. 937–959, 978–1008, 1030–1045); and briefs were filed by counsel for the insurance companies (R. 965–966, 1008–1029) and by counsel for O'Malley (R. 960–964, 967–977). At these hearings, and in these briefs, the district court was urged to enter decrees and order distribution of the impounded funds in accordance with the motion and stipulation. The court was assured that the settlement had been made in good faith at arm's length (R. 633), and that the insurance companies had been forced to make "great concessions" (R. 968, 974, 987); that the settlement was "a fair one" for the policyholders (R. 969, 976);

that the insurance companies had "suffered more in this distribution than anyone else" while the policyholders had been "well taken care of" (R. 971, 976); that O'Malley had "worked faithfully and intelligently for the policyholders" (R. 976–977), whose representative or trustee he was (R. 963; 974).

At the hearing in open court on October 26, 1935, counsel for O'Malley, found by the district court to be wholly innocent of the scheme, but acting on O'Malley's explicit instructions (R. 52), assured the court that the settlement was "a good settlement" (R. 990), "a tremendous and splendid settlement from the standpoint of the policyholders" (R. 1006), and that it was "the cleanest, the most decent, and the finest settlement ever made in Missouri" (R. 985, 988). They informed the court that O'Malley had specifically requested that his counsel "show this Court the motives" which had inspired him to make the settlement (R. 984); that he had driven "as hard a bargain" as he could (R. 987), and had made "a settlement which he thinks is clean, fine, and decent" (R. 987).

On February 1, 1936, the district court, in reliance upon these representations made in open court (R. 52, 633, 680), entered in each of the insurance cases a decree ordering distribution of the impounded funds as prayed in the motions (R. 617–624). By the decrees the court dismissed the

cases (R. 617), but reserved jurisdiction to make "further orders in aid of distribution of impounded moneys" and "for all purposes" of effectuating the decrees (R. 623).

When these decrees were entered the impounded funds aggregated $9,902,158.03 (R. 733). These funds were then "in suspended control of the court to await the ultimate determination of whether such funds belonged to the companies or to the policyholders" (R. 679). The decrees disposed of the impounded funds without any trial of the merits (R. 680).

It appears that the "settlement" was regarded by Street as "satisfactory." Accordingly further payments to Pendergast and O'Malley were resumed. About April 1, 1936, Street gave McCormack $330,000 in currency, which McCormack carried from Chicago to Pendergast's home in Kansas City in a suitcase (R. 711–712, 663). The money was there laid out on a table and counted (R. 712). Pendergast took $250,000 of it, and gave back $80,000 to McCormack (R. 712), saying for McCormack to "take half, to give half of it to Emmett" (R. 713–714, 663). McCormack took the $80,000 to St. Louis, and put it in his safe deposit box (R. 713). Asked why he did this, McCormack explained that "half of it was to go to Mr. O'Malley and he was out of town at the time" (R. 713). McCormack reported to O'Malley that he had the money in the safe deposit box (R. 714).

On April 9, 1936, O'Malley asked for "his $40,000," and McCormack delivered it to him, in cash (R. 714–715. About six months later, in October or November 1936 (R. 782–785, 1123–1124, 1125), at O'Malley's suggestion, Street sent another $10,000 in cash to Pendergast (R. 716–717, 1123).

Thus the $440,000 paid by Street on account was divided among petitioners, $62,500 to O'Malley, $62,500 to McCormack, and $315,000 to Pendergast. There only remained to be completed the distribution of the impounded $10,000,000, whereupon petitioners would collect the $310,000 balance of the $750,000 "fee."

The successful consummation of the scheme was prevented, however, by the disclosure of its elements in the course of an investigation by the Commissioner of Internal Revenue of Street's income tax returns. The investigation uncovered the $440,000 corruption fund which had passed through Street's hands (R. 1051–1052), and this finding was reported to the district court on February 8, 1939 (R. 1046–1048).

In February and March 1939 McCormack was called several times as a witness before a federal grand jury which was investigating the matter (R. 717–719). During his attendance O'Malley met with him three or four times, late at night, and urgently importuned him to conceal the bribery from the grand jury (R. 719, 720, 721, 722). McCormack on three or four appearances concealed

the bribery (R. 718); but finally disclosed the truth to the grand jury on March 17, 1939 (R. 719, 731). Until that time he had kept the bribery secret from everybody, except his co-conspirators, since the inception of the scheme (R. 732).

On May 29, 1939, Superintendent of Insurance Lucas (O'Malley's successor) filed a motion in the insurance rate cases setting up the bribery and praying that the decrees of February 1, 1936, be set aside, and that the insurance companies be ordered to restore to the custody of the court the impounded funds which had been distributed to them (R. 747–755). This was the first notice of the alleged fraud given to the court. The court at once made an order of restitution (R. 633, 692, 756–758, 1061), in accordance with which the companies restored the money they had received under the decrees (R. 734, 735, 781).

At the conclusion of the hearing on May 29, 1939, the district court called to the attention of the District Attorney the question whether contempt proceedings should be filed (R. 1062). After evidence as to the corrupt settlement was taken, and was presented to the court at a hearing on May 20, 1940, the district court requested the Acting United States Attorney, as amicus curiae (R. 75), to institute a contempt proceeding against petitioners, and any others, if the evidence justified joining any others (R. 1077). The information was filed on July 13, 1940 (R. 1–9), and a rule to show cause was issued and served (R. 9–10). Motions

to abate and quash the information were filed, heard and overruled (R. 10–20, 31; 35 F. Supp. 593). Answers were thereupon filed (R. 33–49).

At the trial the government introduced the Street-O'Malley agreement of May 18, 1935 (R. 625–626, 890–894), and certain records from the insurance rate cases (R. 362–693, 733–736, 740–779, 780–781); and specifically requested the court to take judicial notice of "all matters of record of its own proceedings in this case out of which the contempt action grows" (R. 349).[2] McCormack testified as a government witness and related the transactions between himself, O'Malley, Street, and Pendergast, as they are above outlined (R. 694–725). Petitioners declined to make opening statements (R. 625), and offered no witnesses. Their evidence consisted of court records in collateral criminal proceedings, wherein they were

[2] At pages 6–7 of their statement petitioners indirectly challenge the power of the trial court to judicially notice in this proceeding its files, records, and proceedings in the insurance rate litigation. The existence of this power in contempt proceedings has been frequently recognized, however. (*Schwartz* v. *United States*, 217 Fed. 866, 870 (C. C. A. 4); *Oates* v. *United States*, 233 Fed. 201, 206 (C. C. A. 4); *Burke* v. *Territory*, 2 Okla. 499, 37 Pac. 829; *Devoto* v. *State*, 7 Tenn. Civ. App. 38, 41; *State* v. *Jones*, 20 Wash. 576, 56 Pac. 369, 370; *Bowles* v. *United States*, 50 F. (2d) 848, 852 (C. C. A. 4), certiorari denied, 284 U. S. 648. Compare *Randall* v. *Brigham*, 7 Wall. 523, 540, and *Allen* v. *United States*, 278 Fed. 429, 430 (C. C. A. 7). On the same principle this Court has ruled that a court takes judicial notice of its own records in another but interrelated case (*Freshman* v. *Atkins*, 269 U. S. 121, 124; *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331, 336; *West Ohio Gas Co.* v. *Public Utilities Commission*, 294 U. S. 63, 70.)

indicted for conspiracy to obstruct justice (R. 821–829) and to interfere with functions of the Judiciary Department by fraud (R. 830–836) through the procurement of the decrees of February 1, 1936; and a transcript of proceedings upon their pleas and motions in those cases (R. 839–857, 868–875). In these latter cases the District Attorney had entered a nolle prosequi because of an agreement he had made respecting indictments of Pendergast and O'Malley (for evasion of income tax on the money received from Street) to the effect that if Pendergast and O'Malley entered pleas of guilty in the tax evasion cases "the Government would not prosecute them for any other offense growing out of these same transactions" (R. 852–854, 857–858).

On the basis of the foregoing facts the court found that it had been deceived and imposed upon by the false presentation of the character of the settlement, that the petitioners' conduct constituted misbehavior in its presence and that their deception was a continuing offense "fortified and renewed by affirmative supplemental acts of deception committed as late as March 1939." (R. 50–65; see also R. 633.) Accordingly petitioners were adjudged guilty of contempt. Pendergast and O'Malley were sentenced to two years' imprisonment and McCormack was sentenced to probation for two years (R. 66). On June 1, 1942, the Circuit Court of Appeals for the Eighth Circuit affirmed (R. 1188–1206, 1213–1215; 128 F. (2d) 676). On October 12, 1942, this Court granted certiorari.

## SUMMARY OF ARGUMENT

### I

When petitioners, by fraud, induced the district court to issue its decrees effectuating the corrupt settlement of the insurance rate litigation, they acted in contempt of the "authority" of that court. Any interruption of the orderly conduct of a federal court's business or of the normal progress of litigation therein, whether by noise and disorder, or by false statements in open court intended to affect pending litigation, is undoubtedly "misbehavior." Where, as here, petitioners through innocent counsel in open court represented that the settlement was made by antagonistic litigants in negotiations at arm's length, that "misbehavior" occurred in the presence of the court. It did not merely take effect in open court, but was committed there. The false representations of counsel were representations by petitioners, who had sent counsel there with explicit directions to make them. Petitioners, therefore, are not only responsible for their misbehavior but are deemed to be personally present where it occurred and are properly punishable under Section 268 of the Judicial Code (28 U. S. C. Sec. 365) for misbehavior in the presence of the court. In any event, since the statute requires the offense rather than the offender to be in the presence of the court, and since the *misbehavior* for which petitioners are responsible was in fact committed in the presence of the court,

they are properly punishable under Section 268 of the Judicial Code. The false representations were the representations of Pendergast and McCormack as well as of O'Malley because uttered in furtherance of the scheme to which all three were parties. The fact that the imposition on the court was planned elsewhere or continued subsequently does not remove the misbehavior from the presence of the court. The misbehavior in *Nye* v. *United States*, 313 U. S. 33, unlike the misbehavior here, was neither intended to nor did it in fact occur in the presence of the court.

II

Assuming the three-year statute of limitations to be applicable, it had not run when the contempt proceeding was instituted. Petitioners were guilty of a continuing offense consisting of a contemptuous fraud on the court. Petitioners committed a succession of affirmative overt acts of concealment in furtherance of the fraud, both in and out of court, in order to consummate their scheme and keep the deception effective. The last of these overt acts was committed by petitioners only sixteen months before this proceeding began. As in the analogous case of a continuing conspiracy, the statute of limitations, if applicable at all, began to run at the date of the last overt act, whether such act, by itself, was contemptuous or noncontemptuous. Hence the proceeding in contempt was not barred by limitation.

Moreover, limitation on the time of instituting prosecution for a crime is purely a matter of statute. As the decision in *Gompers* v. *United States*, 233 U. S. 604, 606, suggests, there is no statutory limitation specifically applicable to a criminal contempt committed in the presence of the court. Jurisdiction to punish petitioners for contempt, therefore, properly continued until the trials of the insurance rate cases were finally terminated; and the information here was filed before such termination.

## III

The offense with which petitioners are charged is one directed peculiarly against the court. The United States Attorney was without authority to bargain away the court's power to punish for contempt. Hence, even if he entered into an agreement of the sort which petitioners assert, this proceeding could not be barred thereby. Moreover, there is grave doubt whether the asserted agreement was as broad as petitioners suggest.

## IV

The insurance rate cases were properly within the jurisdiction of the three-judge court. The power to punish for contemptuous interference with its business was impliedly granted to that court along with the grant of substantive jurisdiction. Moreover, as a duly constituted court of the United States it also had such power by express

statutory grant (Section 268, Judicial Code, 28 U. S. C., Sec. 385). But even if the contempt proceeding should have been heard by the single judge before whom the insurance litigation originated, the participation in the hearing by the two other judges did not invalidate the District Court's judgment, since the judgment and each ruling made by the court embodied the unanimous decision of the three judges.

## ARGUMENT

### I

### PETITIONERS' CONDUCT CONSTITUTED MISBEHAVIOR IN THE PRESENCE OF THE COURT WITHIN THE MEANING OF SECTION 268 OF THE JUDICIAL CODE (28 U. S. C., SEC. 385)

Petitioners contend that their conduct is not summarily punishable under Section 268 because it was neither "misbehavior" as that term is used in the section nor was it committed in the presence of the court. In support of their contentions they urge that the misbehavior to which the statute alludes consists exclusively in tumultuous or disorderly acts which disrupt proceedings being conducted in court (Pet. Br. 19–20), and that in any event the misconduct here charged—consisting, as they insist, at most in agreeing as litigants to procure from the court a decree disposing of their pending case and the funds theretofore impounded—did not occur in the presence of the court. We submit that neither argument can be sustained.

A. PETITIONERS' CONDUCT WAS "MISBEHAVIOR" WITHIN THE MEANING OF SECTION 268

In urging so narrow a conception of "misbehavior" petitioners do not rely either on a construction of the language of the statute, or on legislative *pari materia* indicating a congressional intention thus to restrict the character (as distinguished from the locus) of summarily punishable conduct. Nor could they with propriety do so. The statute [1] contains no description or qualification of the nature of the misbehavior in the presence of the court which is to remain summarily punishable other than the implicit requirement that it shall in some way subvert, or tend to subvert the authority of the court. Indeed, to the extent that Congress in using the term "misbehavior" was attempting to embody contemporaneous conceptions of contumacy, the word misbehavior must be read against the background of those conceptions (cf. *Keck* v. *United States*, 172 U. S. 434, 446; *Hoffman* v. *Palmer*, 129 F. (2d) 976, 983–984 (C. C. A. 2), certiorari granted, October 12, 1942, No. 300 this term. That background both in England (see 2 Hawkins, *Pleas of the Crown*, c. 22, Sections 35, 38–43) and this country (see *e. g.*, *Butterworth* v. *Stagg*, 2 Johns. Cas. 291 (N. Y.,

[1] The original statute, the Act of March 2, 1831 (c. 99, 4 Stat. 487), contained two sections, the first of which now appears in substantially the same form as § 268 of the Judicial Code and the second of which appears as § 135 of the Criminal Code.

1801); *Blight* v. *Fisher*, Fed. Cas. No. 1542 (1809)) discloses a broader conception of contemptuous misbehavior than is here urged.[4]

The statute establishes two conditions which must be met before summary punishment may be visited upon an offender—there must be misbehavior, and the misbehavior must have occurred within a certain area. Petitioners' contention as to the meaning of "misbehavior" would relate these conditions causally rather than coordinately and make punishable only that conduct which is misbehavior solely *because* it was committed in the presence of the court. The language of the statute, which in no way qualifies the meaning of "misbehavior" in the presence of the court (cf. *Nye v. United States*, 313 U. S. 33, with respect to misbehavior not in the presence of the court) does not sustain this construction.

Nor is so limited a conclusion justified by the available legislative history of the Act of 1831. While its origins in Judge Peck's impeachment trial[5] suggest that the statute was designed primarily to safeguard the freedom of expression of

[4] If direct evidence of congressional knowledge is needed, the trial of Judge Peck reveals a legislative familiarity with this general background. See footnote 7, *infra*.

[5] See Frankfurter and Landis, *Power of Congress over Procedure in Criminal Contempts in "Inferior" Federal Courts—A Study in Expression of Powers*, 37 Harv. L. Rev. 1010. Nelles and King, *Contempt by Publication in the United States*, 28 Col. L. Rev. 401, 525.

those critical of judicial action, it unquestionably restricts the summary contempt power more narrowly than was necessary to curb the evil aimed at. But there is no evidence [6] to indicate that Congress intended to confine the contempt power so narrowly that only tumultuous interference with the conduct of judicial business would be summarily punishable.[7] Nor, with the exception of an obiter suggestion in *Ex Parte Robinson*, 19 Wall. 505, 511, has the statute been read so restrictedly. Such varied misconduct as the attempted bribery of a witness (*In re Savin, Petitioner*, 131 U. S. 267), the dispatch of a letter containing contemptuous language to a judge (*Cooke* v. *United States*,

[6] The only presently available materials on the legislative history of the Act itself are the journals of the Senate and the House of Representatives of the 21st Congress for the 2nd Session [see Frankfurter and Landis, *supra*, at 1026] and the remarks of Congressman Draper, who introduced the resolution directing the House Committee on the Judiciary to "inquire into the expediency of defining by statute all offences which may be punishable as contempts of the courts of the United States, and also to limit the punishment for the same" [7 Cong. Deb., 21st Cong., 2d Sess., February 1, 1831 (Gales and Seaton's Register, Columns 560–561)]. Neither casts any light on the problem here involved, although the latter suggests a congressional search for a more comprehensive delineation of the contempt power than would be required solely to protect the free expression of opinion.

[7] It should be noted in this connection that the House Managers of the Peck impeachment proceedings did not doubt the existence and propriety of the power to punish as contempts misbehavior which subverted the authority of the Court in pending judicial proceedings by violence or otherwise. Stansbury, *Trial of James H. Peck*, 400, 382, 291, 91.

jurors

267 U. S. 517), and the "shadowing" of ~~witnesses~~ (*Sinclair* v. *United States*, 279 U. S. 749) has been summarily punished under the statute, although on none of those occasions was there tumultuous interruption of judicial proceedings or even the likelihood of it. Indeed, the inquiry into the precise scope of "so near thereto" in *Nye* v. *United States*, 313 U. S. 33, suggests no doubt that the misconduct there charged was "misbehavior" as that term is used in Section 268 (cf. Stone, J., dissenting at 53).

That petitioners' conduct here was contumacious cannot be doubted. They conceived and executed a scheme collusively to settle pending litigation and, by concealing from the court the nature of their settlement, deceitfully to obtain its sanction to defraud thousands of innocent persons. The subsequent retrial of the insurance rate case and recall of the distributed fund demonstrate that in a very real sense petitioners' misbehavior interrupted the orderly conduct of the court's business. And by traditional standards the abuse of the court's process which inheres in deceitfully obtaining its judgment for fraudulent purposes[*] and the

[*] See *e. g.*, 2 Hawkins, *Pleas of the Crown*, c. 22, Sections 35, 38–43; *Everet* v. *Williams*, 9 L. Q. R. 197; *Butterworth* v. *Stagg*, 2 Johns. Cas. 291 (N. Y., 1801). Of the same *genre* is the institution of collusive litigation for the purpose of defrauding innocent persons' behavior which on more than one occasion was stated to be punishable as a contempt of court. *Lord* v. *Beazie*, 8 How. 250; *Cleveland* v. *Chamberlain*, 1 Black 419. Although this Court has never sum-

flaunting of the court's authority[*] which attaches to fraudulently removing funds from its custody marks petitioners' conduct as contempt.

B. PETITIONERS' MISBEHAVIOR OCCURRED IN THE PRESENCE OF THE COURT

Petitioners assert in effect that their misconduct consisted at most in agreeing among themselves at places far distant from the court to induce the court to enter a decree dismissing the pending litigation and ordering the distribution of the impounded fund. This contention, however, does not adequately describe their actual misconduct. The misbehavior for which they have been punished consisted not simply in agreeing among themselves as to a course of action, but in actually executing their scheme to impose upon the court. The acts of representing to the court that an amicable settlement had been reached, that the suit should be dismissed, and that a decree of a certain character was desired by both parties, were therefore necessary parts of the scheme, not merely its re-

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marily punished such behavior, lower federal courts have done so. Cf. *May Hosiery Mills* v. *F. & W. Grand 5-10-25 Cent Stores*, 59 F. (2d) 218 (Mont.), reversed, *sub nom. May Hosiery Mills* v. *United States District Court*, on the ground that the facts did not establish the misbehavior charged, 64 F. (2d) 450 (C. C. A. 9). The collusive settlement of honestly initiated litigation here is indistinguishable in its contumacy from the collusive initiation of litigation to defraud innocent persons.

[*] The statute, it will be noted, is addressed to, and authorizes federal courts to punish, "contempts of their *authority*." Cf. also *United States* v. *Shipp*, 203 U. S. 563.

sults.[10] And there can be no question that peti-

[10] Petitioners urge in their brief (Pet. Br. pp. 4, 28) that the information does not charge that the contempt consisted of counsel's misrepresentations in open court. It does charge that the decree of February 1, 1936, was "wrongfully, fraudulently, corruptly, unlawfully and in contempt of the Court induced and procured" (R. 4). It then sets out in detail the facts as to petitioners' corrupt scheme to accomplish the settlement of the rate litigation through bribery of O'Malley (R. 5–7), and it charges that the bribe payments by Street and the corrupt acts of petitioners were "for the purpose of obtaining from the United States Court a decree by the fraudulent means aforesaid, and to induce each and all of them *to conceal from the United States District Court the fraudulent and corrupt transactions* which have hereinbefore been set forth" (R. 7); it charges that petitioners agreed with each other to keep all of said transactions "*concealed from this Honorable Court and that by affirmative acts of concealment and silence they would prevent the Court from having any knowledge or any information whatever concerning the fraudulent and corrupt transactions*" (R. 7–8); and it charges that "*the concealment* of said transactions hereinbefore set out *by the defendants and each* of them, was so effective that neither this Court nor any officer thereof, or any officer of the United States knew or could, by the exercise of the utmost diligence, have had any knowledge thereof" (R. 8). (Italics supplied.)

The information, which in any event is not to be measured by the strict rules applicable to a criminal indictment (cf. *Ex parte Hudgings*, 249 U. S. 378, 383; *In re Savin, Petitioner*, 131 U. S. 267, 279; *Randall* v. *Brigham*, 7 Wall. 523, 540; *Clark* v. *United States*, 61 F. (2d) 695, 699 (C. C. A. 8) affirmed, 289 U. S.; *Kubik* v. *United States*, 57 F. (2d) 477, 479 (C. C. A. 8), thus was amply sufficient to cover the misrepresentations made by the counsel whom petitioners sent into court for the purpose. Particularly is this true after finding and judgment. *Hagner* v. *United States*, 285 U. S. 427, 433; *Dunbar* v. *United States*, 156 U. S. 185, 191–192.

tioners expressly directed the execution of these maneuvers in open court.[11] Whether the occurrence of any one portion of the plan—*e. g.*, fraudulently agreeing to settle the pending litigation, or deceitfully inducing the court to issue orders to that effect, or attempting to conceal (e. g., by admonishing silence on the less sturdy participants) the fraud thus perpetrated until the funds were distributed and the participants paid off—would itself have been punishable (cf. *Conley* v. *United States*, 59 F. (2d) 929, 936 (C. C. A. 8)), is not the question. The offense for which petitioners were punished is the imposition of their fraudulent scheme upon the court.

That acts performed in pursuance of the scheme—*i. e.*, the misrepresentations in open court, and the requests for the dismissal of the decrees and release of the impounded funds—occurred in the presence of the court cannot be doubted.[12] And that by normal standards of criminal liability petitioners were responsible for these acts which they expressly commanded, likewise cannot be denied. *United States* v. *Gooding*, 12 Wheat. 460, 469; *Merritt* v. *United States*, 264 Fed. 870,

[11] See note 13, *infra*.

[12] It should be noted in this connection that we are here concerned with acts in open court performed as part of the formal presentation of argument in a pending cause, not with communications sent to a judge from a distant place, either as part of (cf. *Nye* v. *United States*, 313 U. S. 33) or collateral to (cf. *Cooke* v. *United States*, 267 U. S. 517) pending litigation.

875 (C. C. A. 9); *Maxey* v. *United States*, 30 App. D. C. 63, 74–75; cf. *American Fur Co.* v. *United States*, 2 Pet. 358, 364; *Stockwell* v. *United States*, 13 Wall. 531, 550. McCormack, O'Malley and Street expressly agreed to these maneuvers in furtherance of the general scheme and Pendergast, although not consulted on the precise mechanics by which the court's authority would be subverted, participated equally in the plan to impose the fraudulent settlement on the court. Indeed, O'Malley's participation in this scheme was at all times at Pendergast's behest (R. 703–705, 654, 706, 707–710, 662). The latter cannot now disclaim his joint responsibility for the effectuation by reasonably anticipated means of the very plan for which this "partnership in criminal purposes" was formed. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 253–254; *United States* v. *Kissel*, 218 U. S. 601, 608; *cf. St. Clair* v. *United States*, 154 U. S. 134, 149; *cf.* also *Coplin* v. *United States*, 88 F. (2d) 652, 660–661 (C. C. A. 9); *Lennon* v. *United States*, 20 F. (2d) 490, 494 (C. C. A. 8); *Smith* v. *United States*, 61 F. (2d) 681 (C. C. A. 5), certiorari denied, 288 U. S. 608; *Weiss* v. *United States*, 120 F. (2d) 472 (C. C. A. 5), rehearing denied, 122 F. (2d) 675, certiorari denied, 314 U. S. 687, rehearing denied, 314 U. S. 713; *Baker* v. *United States*, 115 F. (2d) 533, 540 (C. C. A. 8), certiorari denied, 312 U. S. 692, rehearing denied, 312 U. S. 715; *Belt* v. *United States*, 73 F. (2d) 888, 889,

(C. C. A. 5), certiorari denied, 294 U. S. 713; *Reuben* v. *United States*, 86 F. (2d) 464, 468–469 (C. C. A. 7), certiorari denied, 300 U. S. 671, rehearing denied, 301 U. S. 712.

This responsibility for the misbehavior in open court is sufficient under traditional principles of the criminal law to locate petitioners at the scene of the offense. Concisely expressed in *State* v. *Barnett*, 15 Ore. 77, 81–82, 14 Pac. 737, 739), the conception is that—

> * * * In judgment of the law, he who procures the act to be done is present at its commission, and will not be permitted to deny that he personally committed it at the place where it was done. In such case the innocent agent is not an offender; but the employer, though absent, is the principal offender, and is deemed to have been personally present.

This conception, which receives almost uniform adherence in the criminal law (see *Hyde* v. *United States*, 225 U. S. 347, 363; *Commonwealth* v. *White*, 123 Mass. 430, 433–434; *People* v. *Adams*, 3 Denio (N. Y.) 190, 210; *People* v. *Keller*, 79 Cal. App. 612, 617; *Barkhamsted* v. *Parsons*, 3 Conn. 1, 8; *Simpson* v. *State*, 92 Ga. 41, 17 S. E. 984, 985; *Girdley* v. *State*, 161 Tenn. 177; *State* v. *Faggard*, 25 N. M. 76, 177 Pac. 748, 750) has likewise been adopted in establishing the offender in the presence of the court when his counsel, or someone for him, has submitted contemptuous papers to the court or

has sought fraudulently to impose upon the court (cf. *Owen* v. *Dancy*, 36 F. (2d) 882, 885 (C. C. A. 10) certiorari denied, 281 U. S. 746; *Lamberson* v. *Superior Court*, 151 Cal. 548, 91 Pac. 100; *Blodgett* v. *Superior Court*, 210 Cal. 1, 290 Pac. 293; *In re Estate of Kelly*, 365 Ill. 174, 194, 6 N. E. (2d) 113, 118, 485, 486; cf. also *Cooke* v. *United States*; *Sinclair* v. *United States*, *supra*. In this case, where those responsible for the misbehavior deliberately intended and explicitly instructed counsel to appear in court and make the representations which were necessary to effectuate their scheme, that view is particularly apposite.[13]

[13] In this case petitioners uniquely reduced to writing their plan to consummate their conspiracy in the presence of the court. In a session with Street, his ostensible adversary, and McCormack, O'Malley, acting at Pendergast's behest (R. 703–705, 706, 707–710, 654, 662), agreed to permit an increase of 13⅓ percent (four-fifths of 16⅔ percent) in insurance rates, retroactive to June 30, and to divide the impounded fund 80 percent to the insurance companies and 20 percent to the policyholders (R. 725, 891–892). The participants then set about to devise a plan which would secure the *actual distribution* of the impounded millions in the custody of the district court (R. 505–508), awaiting final decision of the cases on their merits (R. 679–680). Their plan was embodied in the agreement of May 18, 1935, which Street and O'Malley signed (R. 890–894). It provided that, "*the parties will by their attorneys appear in both the United States Court and in the Circuit Court of Cole County and join in seeking appropriate orders from such courts for distribution of impounded money* * * *." They further agreed that, "The insurance companies will file amendments or supplements to their bills of complaint or petitions setting forth the order of the Superintendent as herein contemplated, or take the appropriate means *to present to the courts in which proceedings are*

But it is not necessary to rely on accepted conceptions of "presence" in determining whether the

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*pending* this Agreement to settle the case upon payment of 20% to policyholders and the Superintendent will cause answer to be filed thereto or otherwise *appropriately confess* the same and *consent* to decrees for distribution of impounded moneys as herein indicated and confirming the agreement as to return and distribution of moneys as herein recited, and the parties will *mutually undertake to join in seeking orders or decrees* confirming their agreement. * * *" [Italics supplied.] Petitioners, of course, intended that the conventional litigation procedure would be followed, and that the motions and stipulations would be presented to the court, not by themselves in person, but by counsel of record for the parties. The misconduct which petitioners so clearly intended to take place in the presence of the court occurred as planned. After filing the motions for decree (R. 603–607) and stipulations (R. 607–609, 663) and supporting briefs (R. 960–964, 965–966, 967–977, 1008–1029), counsel, acting on petitioners' explicit instructions in open court assured the court that the settlement was a genuine, good faith settlement by antagonistic litigants (R. 52, 633); that O'Malley had driven "as hard a bargain" as he could (R. 987); that the insurance companies had been forced to make "great concessions" (R. 968, 974, 987), and had "suffered more in this distribution than anyone else" while the policyholders had been "well taken care of (R. 971, 976); that O'Malley had "worked faithfully and intelligently for the policyholders" (R. 967–976) whose representative or trustee he was (R. 964, 974); that he (O'Malley) thought the settlement was "clean, fine, and decent" (R. 987); and when counsel assured the court that the settlement was not only a "good settlement" (R. 990), but was "a tremendous and splendid settlement from the standpoint of the policyholders" (R. 1006), and was, indeed, "the cleanest, the most decent, and the finest settlement ever made in Missouri" (R. 985, 988). The situation in legal effect was the same as if the petitioners had personally appeared before the judges and uttered their misrepresentations. (See cases cited, *supra* in text.)

misbehavior here was committed "in the presence" of the court. The implicit assumption in petitioners' contention that they are not summarily punishable because they were not physically present at the scene of their misbehavior is that the geographical limitations imposed by Section 268 of the Judicial Code are aimed at the offender rather than at the offense. On the contrary, however, the statute as its language and grammar demonstrate is directed at the offense rather than the offender.[14] And substantial considerations of administration also suggest the offense as the object of the limitation. To pivot the summary contempt power exclusively on the presence of the offender

[14] The statute provides that the power of federal courts to invoke summary punishment for contempt shall not extend to "any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience * * * by any such officer, or by any party, juror, witness, or other person to any lawful" decree or order.

Grammatically, the words "in their presence" modify "the misbehavior of any person." And the fact that the statute delineates three categories of contumacious conduct—(1) misbehavior of any person, (2) misbehavior of any officers, and (3) disobedience by anybody of the court's decrees—emphasizes the propriety of this reading. Moreover, to read the language of the statute as proscribing the misbehavior *of any person who is in the presence of the court* would literally require only the offender, and not the misbehavior, to be in the court's presence. The consequence of such a reading (see text, *supra*) suggests that the construction of the language of the statute here urged is more consonant with the intention of Congress.

in court virtually eliminates the restrictions intended by the legislation, *e. g.*, where the offense is being committed elsewhere while the person responsible for it is in court. And to require the presence in court of both the offense and the offender would exclude offenses which there is no evidence to indicate that Congress purported to exclude (cf. pp. 20, 22, *supra*)[13] and which this Court has held to be properly within the contempt power (cf. *Cooke* v. *United States, supra*). Indeed, by that standard the court's power would often hinge on the relatively innocent presence of the offender (cf. *Sinclair* v. *United States,* 279 U. S. 749) and might be thwarted by his equally fortuitous absence. It is clear that in speaking of the "presence" of the court, Congress in the Act of 1831 geographically circumscribed conduct which could be summarily punished; *Nye* v. *United States,* 313 U. S. 33, holds that in the companion clause, also geographical conceptions constitute a test of liability. But in each case, it is the offense, not the offender, to which the limitations are addressed. The only restricting ends known to be intended by the statute are more than served by applying the limitation ~~only~~ to the misbehavior alone. To apply the geographical standard to both the offense and the offender would therefore im-

[13] *E. g.*, fraudulently obtaining judicial process or submitting false papers to the court in the hope of delaying pending proceedings.

pose an additional haphazard test without any support in either the language or the history of the statute.

That the fraud thus imposed upon the court was conceived and planned elsewhere, or completed subsequently, does not remove the misbehavior from the presence of the court. The essence of the offense—the misrepresentations and the requests for the dismissal of the litigation and distribution of the fund—was committed in open court. The misbehavior is thus established in the presence of the court. That the offense is appropriately located where in substance it was committed is suggested by *Burton* v. *United States*, 202 U. S. 344, 381–389; *In re Palliser*, 136 U. S. 257, 265–268; *Horner* v. *United States*, 143 U. S. 207, 213–214; *Salinger* v. *Loisel*, 265 U. S. 224, 235; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 250–254. The approach in those cases to the geographic limitations established by the Sixth Amendment for the venue of crimes points to a similar treatment of the geographical restrictions here imposed. Indeed, to the extent that those cases permit the offense to be located by the occurrence of any acts necessary for its commission they go beyond the necessities of this case. The problem here is whether when the essence of the misbehavior—the perpetration of the fraud upon the court—occurs in the presence of the court, the offense can be withdrawn from the scope of other-

wise permissible summary punishment because other elements therein—the preparation of the plan, or the completion of the offense—occurred elsewhere. This Court has in the past implied that it cannot (cf. *Sinclair* v. *United States*, 279 U. S. 749, 765 (where Section 268 was invoked to punish a person who hired detectives to "shadow" jurors "within the court room, near the door of the court house, or within the city); *Lord* v. *Veazie*, *Cleveland* v. *Chamberlain*, *supra*, p. 24).

The fact that the offense here committed may be reached by information under Section 135 of the Criminal Code does not exclude it from the summary contempt provisions of Section 268. Although both sections were enacted as part of one statute and the present Section 135 of the Criminal Code was unquestionably designed to cover offenses formerly within the contempt power, it is clear that the two sections overlap (*Nye* v. *United States*, 313 U. S. 33; *In re Savin, Petitioner*, 131 U. S. 267; *Sinclair* v. *United States*, 279 U. S. 749). Whether or not the offense is within the contempt power, therefore, cannot be determined by establishing that it is within the scope of the Criminal Code (cf. *Ex parte Hudgings*, 249 U. S. 378; *Clark v. United States*, 289 U. S. 1).

Petitioners' liability to summary punishment here is not inconsistent with either the decision or the reasoning in *Nye* v. *United States*, 313 U. S. 33. In that case the misbehavior with which the Court

was concerned was inducing an unwary litigant to request dismissal of an action he had commenced in a district court, and mailing a letter, signed by him and requesting dismissal, to the district judge before whom his case was pending. The execution of the scheme there involved was effected from a distance, not in the presence of the court.[16] Indeed, in that case it was not necessary,[17] and the evidence does not show that it was even contemplated, that any appearance in the court's presence should be made. In contrast the imposition on the court in this case was effected by behavior in open court, and the contemnors, in complete agreement on the scheme,[18] expressly contemplated this.[18] And there is little doubt that the scheme in this

[16] Contrary to the erroneous assumption in Judge Riddick's dissenting opinion (R. 1209–1211) and petitioners' brief (p. 28) Nye did not appear in court by counsel in support of defendant's motion to dismiss the *Elmore* case. Petitioners erroneously rely upon Nye's appearance to defend himself on the contempt charge as an appearance in committing the contempt. In view of the fact that at most the misbehavior extended to the delivery of the latter to the judge's secretary (Nye Record, p. 143), no part of it occurred "in the presence" of the court. Petitioners' suggestion that the postman in the *Nye* case may be analogized to counsel in this case as an agent of the offender is, therefore, beside the point (but cf. *Cooke* v. *United States*, *supra*.)

[17] A dismissal of the *Elmore* damage suit might have been obtained without any order of court, upon the mere filing of a notice of dismissal (cf. Rule 41 of the Rules of Civil Procedure).

[18] In this connection it should be noted that the scheme in the *Nye* case did not involve the B. C. Remedy Company, the

case could not have been perpetrated without misconduct in the court's presence.[20] To the extent, therefore, that the imposition on the court in this case required the appearance of counsel, that such appearance was expressly intended, and that the scheme did in fact involve misbehavior in open court, it differs from the scheme involved in *Nye* v. *United States*. That the successful execution of a plan of the character and proportions here shown required and resulted in misbehavior in the presence of the court serves to bring the offense within the court's summary power.

## II

### THE PRESENT PROCEEDING IS NOT BARRED BY THE STATUTE OF LIMITATIONS

In contending that the statute of limitation bars the present contempt proceeding, petitioners urge that the misbehavior here punished occurred, at the latest, when the misrepresentations were made

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adverse litigant in the pending litigation (Nye Record, pp. 137, 148). Hence any appearance in court by the B. C. Remedy Company in that case was unrelated to the misbehavior there charged. In contrast in this case both sides to the pending litigation agreed upon, indeed created, the scheme to impose upon the court, and appearances in court were made for both parties.

[19] See footnote 13, p. 29, *supra*.

[20] The dismissal of the insurance rate cases and the distribution of the $10,000,000 fund required an order of the court before whom the rate litigation was then pending. It is highly unlikely that such disposition of litigation of that importance could have been effectuated by the submission of papers by mail without any appearance by counsel in court.

to the court (more than three years prior to the inception of this proceeding) and that Revised Statutes, Section 1044, 18 U. S. C., Section 582, establishing a three-year statute of limitations for federal offenses in general, limits the period of prosecution for their misbehavior. Petitioners' defense requires that they sustain both propositions. We submit that neither can be sustained.

A. PETITIONERS' MISBEHAVIOR CONTINUED UNTIL WITHIN THREE YEARS BEFORE THE PRESENT PROCEEDING WAS BEGUN

The offense here punished consisted in the imposition of a fraudulent scheme upon the court. The successful execution of this scheme required among other things certain preliminary discussions and meetings at which its details were planned, misrepresentations to the court and requests for orders of a certain character, and continuous cooperation in concealing the elements of their plan until its completion.[21] But the fraud on the court was not fully effected until eighty percent of the

[21] That secrecy was basic to the scheme and its significance appreciated by the participants are abundantly clear from an examination of their conduct—the bribery payments in the spring of 1935 (R. 699–700, 703–710, 631, 651, 653, 654, 662, 1123), in April of 1936 and in October and November of 1936 (R. 716–717, 782–785, 1123–1124, 1125) were all cash transactions (R. 711–712, 663). All were executed with the utmost secrecy—McCormack personally carried the money in a bag or suitcase (R. 706–717); while awaiting distribution, it was kept in McCormack's safe deposit box (R. 709–710, 713–715). And although the participants reduced their agreement to writing in May 1935 (R. 724–725, 890–894, 662, 1118), they concealed its character from their counsel, whom they caused

impounded funds was distributed to the insurance companies and the $750,000 fee was paid by Street and divided between petitioners. Then, and not until then, would the fraud be completed. In an effort to conceal their scheme when the tax investigation threatened to elicit information about it before its completion, petitioner O'Malley in February and March 1939 importuned petitioner McCormack to keep secret from the grand jury the elements of their plan (R. 719–722); as a result petitioner McCormack refused to disclose the scheme to the grand jury in his first few appearances before them in February and March 1939 (R. 717–719, 731). These attempts to conceal the continuing fraud differ significantly from efforts—by silence or otherwise—to conceal the success of a completed offense in order to avoid detection (*e. g.*, *United States* v. *Irvine*, 98 U. S. 450; *T. F. Hart Inv. Co.* v. *Great Eastern Oil Co.*, 27 F. Supp. 713 (E. D. Tex.), but cf. *United States* v. *Kissel, supra*, at 607–608). Here the consummation of the offense—full distribution of the impounded funds and the participants' fees—depended upon continued concealment. The affirmative acts of enjoining secrecy were thus in furtherance of the

on June 18 and 19 of 1935 to file motions for decrees which would effectuate the corrupt settlement (R. 603–606, 607–609, 663) and on June 22 and October 26, 1935, and January 24, 1936, to appear in open court and make false representations (R. 937–959, 978–1008, 1030–1045) and file supporting briefs (R. 960–964, 965–966, 967–977, 1008–1029) in order to induce the court to enter the decrees sought.

continuing fraud on the court, and therefore parts of the offense, rather than attempts to avoid apprehension for a completed offense. Cf. *Eldredge* v. *United States*, 62 F. (2d) 449, 451 (C. C. A. 10), and compare *Freeman v. United States*, 244 Fed. 1, 9 (C. C. A. 7),[22] certiorari denied, 245 U. S. 654; *Murray* v. *United States*, 10 F. (2d) 409 (C. C. A. 7), certiorari denied, 271 U. S. 673. As elements in the scheme they are indistinguishable from the preliminary discussions of the participants here, or the efforts of other schemers to allay their victims' suspicions in the course of a continuing fraud. Cf. *Newingham* v. *United States*, 4 F. (2d) 490 (C. C. A. 3), certiorari denied, 268 U. S. 703; *Lewis* v. *United States*, 38 F. (2d) 406, 415–416 (C. C. A. 9); *Brady* v. *United States*, 26 F. (2d) 400, 401 (C. C. A. 9), certiorari denied, 278 U. S. 621. Moreover, petitioner Pendergast is jointly liable for the conduct of the participants during the pendency of the scheme and until its conclu-

[22] Petitioners suggest (Pet. Br. 9–10) that the evidence does not indicate that these efforts to conceal the scheme were agreed to by its participants, and that therefore they cannot constitute elements in the joint offense. However, the evidence discloses fully the continuous efforts of the petitioners to conceal the scheme. Indeed, this secrecy went to the very heart of their offense. Under those circumstances the court might properly infer from the evidence that secrecy in executing the scheme was at all times contemplated by all its participants (see *Glasser* v. *United States*, 315 U. S. 60, 80; *Eastern States Lumber Assn.* v. *United States*, 234 U. S. 600, 612; *The Wenona*, 19 Wall. 41, 58).

sion,[23] even though his participation may not have been active during the three years before the present proceeding was instituted.[24]

Since the fraudulent scheme which the petitioners sought to impose upon the court thus continued until within three years before the commencement of this proceeding, the question presented is whether its inception before the three-year period removes the scheme from the possibility of summary punishment. While the period of limitation on punishment for a continuing contempt has never been determined by this Court (cf. *Gompers* v. *United States*, 233 U. S. 604),[25] authority is not lacking to establish that the statute of limitations begins to run only after the chronologically latest acts in the execution of a continuing offense. *Hyde* v. *United States*, 225 U. S. 347, 369; *Brown* v. *Elliott*, 225 U. S. 392, 400–401; *United States* v. *Kissel*, 218 U. S. 601, 607–608.

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[23] Cases cited *supra*, pp. 27–28; see also *Hart* v. *United States*, 112 F. (2d) 128 (C. C. A. 5), certiorari dismissed, 311 U. S. 722, rehearing denied, 311 U. S. 726.

[24] *Eldredge* v. *United States*, 62 F. (2d) 449, 451 (C. C. A. 10). Cf. *United States* v. *Kissel*, 218 U. S. 601, 606.

[25] That case involved the question whether, and which of, sixteen separately charged violations of an injunction were committed before the three-year period prescribed by Revised Statutes, Section 1044. The Court expressly distinguished the situation there involved from the situation of a single continuing offense composed of many elements, stating at p. 610, "* * * this is not an indictment for conspiracy, it is a charge of *specific acts in disobedience of an injunction*. The acts are not charged as evidence but as *substantive offenses; each* of them, so far as it was a contempt, was *punishable as such, and was charged as such*, and therefore each must be judged by itself * * *." [Italics supplied.]

Although those cases were addressed to conspiracies of diverse sorts their rationale applies equally to the offense here involved. The immunity provided by the statute of limitations contemplates that the offender will long since have ceased his illegal conduct. But petitioners' scheme would fail of success and the imposition on the court for which they were summarily punished would not be completed until the impounded funds were fully distributed. Continuance of the misconduct here, therefore, prevented that immunity from maturing.

> Having joined in an unlawful scheme, having constituted agents for its performance, *scheme and agency to be continuous until full fruition be secured,* until he does some act to disavow or defeat the purpose he is in no situation to claim the delay of the law. *As the offense has not been terminated or accomplished he is still offending.* And we think, consciously offending, offending as certainly, as we have said, as at the first moment of his confederation, and consciously *through every moment of its existence.* The successive overt acts are but steps toward its accomplishment, not necessarily its accomplishment. This is the reasoning of the *Kissel Case* stated in another way. *As he has started evil forces he must withdraw his* support from them or incur the guilt of their continuance. [Italics supplied.] *Hyde* v. *United States, supra,* at 369.

The general proposition thus enunciated equally governs where the continuous cooperation consists, as here, in concealing the elements of the plan until it is fully consummated (cf. *Eldredge* v. *United States, supra*). And the geographical limitations of Section 268 are not overstepped by the temporal extension of the offense. The policy embodied in that section does not purport to make summarily punishable only spontaneous or momentary behavior.

Petitioners argue (Pet. Br. pp. 37, 44) that in meeting the limitation defense we abandon our theory that the misbehavior occurred in the presence of the court. *Petitioners create an imaginary inconsistency where none exists.* In meeting the defense based on the contempt statute, and in meeting the limitation defense, our position is exactly the same. It is this: Petitioners' contempt consisted in a course of conduct, a connected unbroken succession of related acts and statements designed to deceive and defraud the court, and to continue the deception so there would be no interruption in the distribution of the impounded fund. Some of petitioners' acts and statements were "in the presence of the court," *and therefore rendered petitioners subject to punishment under the contempt statute.* Others of their acts and statements were out of court; *but they were a part, and in furtherance, of the fraud on the court, and therefore operated to toll the statute of limitations.*

Petitioners contend further (Pet. Br. p. 45) that "noncontemptous acts in 1939" could not revive "a contempt prosecution already barred by the statute of limitations." But, in the first place, the affirmative acts of concealment by O'Malley and McCormack in 1939, being in furtherance of the fraud on the court, *were a part of it,* and hence were not "noncontemptuous." In the second place, the prosection for contempt was not "already barred" in 1939, because petitioners' fraud on the court was a continuing fraud *which persisted into that year.*

Petitioners also argue (Pet. Br. p. 45) that to subject them to punishment for acts in 1939 would subject them to punishment for acts "which did not constitute misbehavior on" their "part in the presence of the court or near thereto." Petitioners ignore the point that while the acts in 1939, standing alone, were not contemptuous (because not in the presence of the court), nevertheless those acts were *in furtherance* of their contemptuous (and punishable) fraud on the court, and therefore tolled the statute of limitations—as an innocent overt act tolls the statute in a conspiracy case. An overt act standing alone may be entirely *innocent* (*United States* v. *Rabinowich,* 238 U. S. 78, 86; *United States* v. *Bradford,* 148 Fed. 413, 417, cf. *Braverman* v. *United States,* decided Nov. 9, 1942, Nos. 43–44, this Term); but if it is done in furtherance of a substantive offense

it becomes a part of the offense, and the statute of limitations begins to run from the date of such overt act. *Brown* v. *Elliott*, 225 U. S. 392, 400–1; *United States* v. *Kissel*, 218 U. S. 601, 607; *Hyde* v. *United States*, 225 U. S. 347, 369–370.

Accordingly the misbehavior here committed did not terminate with the misrepresentations to the court but continued until within three years of the commencement of this proceeding and the petitioners are, therefore, properly punishable.

B. REVISED STATUTES, SECTION 1044, DOES NOT BAR THE PRESENT PROCEEDING

The defense of limitations urged by petitioners is predicated on the applicability to their offense of Revised Statutes, Section 1044, 18 U. S. C., Section 582, which provides: "No person shall be prosecuted, tried, or punished for any offense, not capital * * * unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed * * *." While the statute speaks of offenses generally, and literally viewed there may be some question as to its applicability to contempts, the decision in *Gompers* v. *United States*, 233 U. S. 604, established that at least by analogy a three-year limitation exists on the prosecution of persons for the violation of injunctions. In that decision, however, Mr. Justice Holmes with great care pointed out that "* * * all that we have to say concerns proceedings of this sort only [criminal contempt

proceeding for the violation of injunctions], and further, only proceedings for such contempt not committed in the presence of the court" (p. 606).

The subject matter of the decision suggests the basis for the explicit limitation of its scope. The offense there involved was the violation of an injunction prohibiting certain conduct. The illegality of the defendant's behavior, like that of traditional criminal behavior, consisted in the violation of a general rule prescribing the limits of permissible conduct in the defendant's economic and social dealings with other persons. (Cf. *United States* v. *Goldman*, 277 U. S. 229, 235.) And the considerations which impel a limitation on the period during which a person can be prosecuted for such offenses are no different than considerations addressed to the same problem in the criminal law.

In this case, however, we are concerned with a violation of norms prescribing the method of conducting business in the courts, not the norms prescribing limitations on socially undesirable behavior in general. Petitioners were here punished because their misconduct interfered with the orderly administration of judicial business.[26] Since the offense and the power to punish it are thus

[26] That their behavior was independently punishable as a violation of more generally applicable norms is not here relevant, since we are concerned only with the authority to invoke that punishment which is provided for interfering with the business of the courts.

designed to assure the proper conduct of judicial proceedings, appropriately enough the time during the proceedings when the sanction is to be imposed is to be determined by the presiding judge. Accordingly, the trial judge has often been upheld in delaying the imposition of punishment in such situations until that time in the proceeding when he deems it most appropriate. *Ex parte Terry,* 128 U. S. 289, 311, 313; *In re Maury,* 205 Fed. 626, 631–632 (C. C. A. 9); *In re Cary,* 165 Minn. 203, 206, N. W. 402; *Brown* v. *State,* 178 Okla. 506, 507, 62 P. (2d) 1208, 1209. And by the same token the offense does not remain eternally punishable. The outer limits of this discretion are determined by the conclusion of the proceeding in which the contempt arises.

The insurance rate litigation, largely because of the complexity of its subject matter, consumed an unusually long period in the taking of testimony and the distribution of the *res.* That the proceeding was still pending when the contempt was discovered and its prosecution instituted, however, is clear.[27] The discretion which the court here had

[27] While the decrees of February 1, 1936, provided for dismissal of the cases (R. 617) they further provided that "notwithstanding dismissal" the district court expressly reserved power and authority and retained jurisdiction (R. 623)—"to make further orders in aid of distribution of impounded moneys, * * * and to take any action deemed necessary to effectuate the purposes of this Decree. Jurisdiction over all persons or parties affected by this Decree is reserved for all purposes of effectuating this Decree." The

in deciding at what time during the proceeding it would be most appropriate to summarily punish the offenders would unquestionably have authorized delay in invoking the sanction, if the offense had been discovered at the time of its occurrence. Here, however, because of the skill with which the offenders concealed their scheme it was not discovered until the latter part of the proceeding. No reason can be suggested for placing a premium on petitioners' skill in tricking the court. And in the absence of an explicitly applicable statute of limitations little reason appears here for barring the exercise of appropriate judicial power during the pendency of the litigation.

## III

### THE PRESENT PROCEEDING IS NOT BARRED BY ANY AGREEMENT BETWEEN PETITIONERS AND THE UNITED STATES ATTORNEY

The contention of petitioners Pendergast and O'Malley that the prosecution for contempt is in violation of an agreement between themselves and the United States Attorney affords no defense in this proceeding.

The offense here charged is peculiarly an offense against the court. Its prosecution was instituted on the initiative of the court and was only carried

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trial of the insurance rate proceedings did not terminate until after the court recalled the hitherto distributed funds, and tried the issues on the merits, and issued its decrees on August 14, 1940 (R. 628-629). The information in this contempt proceeding was filed on July 13, 1940 (R. 1).

out by the United States Attorney at the request of the judges (R. 75). So completely was the control of this proceeding in the hands of the court rather than the United States Attorney that the latter need not even have been called upon to act in it. Cf. *Cooke* v. *United States*, 267 U. S. 517, 534–535; *Ex parte Terry*, 128 U. S. 289, 307–309; *In re Debs, Petitioner*, 158 U. S. 564, 595.[28] He was therefore without authority, as petitioners are presumed to have known (cf. *Whiteside* v. *United States*, 93 U. S. 247, 257; *Hawkins* v. *United States*, 96 U. S. 689, 691; compare *United States* v. *Mayer*, 235 U. S. 55, 70), to bargain away the court's power to punish for offenses against it. Indeed, since the United States Attorney could not, by agreement, bar proceedings over the initiation of which his office has control (cf. *Whiskey Cases*, 99 U. S. 594; *Buie* v. *United States*, 76 F. (2d) 848 (C. C. A. 5), certiorari denied, 296 U. S. 585, rehearing denied, 296 U. S. 662; compare *District of Columbia* v. *Buckley*, 128 F. (2d) 17 (App. D. C.), certiorari denied, October 12, 1942, No. 290, this Term), *a fortiori* the present proceeding could not be barred by any such agreement.

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[28] Petitioners' suggestion that the style of the proceeding, *United States* v. *Pendergast*, demonstrates its character as a proceeding brought by the United States Attorney is not well taken. Cf. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 446; *Ex parte Terry*, 128 U. S. 289, 297–299; *In re Fox*, 96 F. (2d) 23, 25 (C. C. A. 3); *Phillips Sheet & Tin Plate Co.* v. *Amalgamated Association of Iron, Steel & Tin Workers*, 208 Fed. 335, 343–344 (S. D. Ohio).

Moreover, there is grave doubt whether the agreement here asserted covered the present offense. That it was intended to cover criminal prosecutions which the United States Attorney might bring seems clear. The record in this case (R. 840–845, 852–854, 857–858) demonstrates that this was the basis for his request for the dismissal of the indictments charging conspiracy to obstruct justice and the subsequent plea of *nolle prosequi* (R. 63–65).[29] But there is no evidence to indicate that he intended by this agreement to foreclose the exercise by the district court of its proper authority. And the ignorance of this agreement in which the district court was long kept—by the petitioners as well as by the United States Attorney—does not suggest any such understanding between the parties.[30]

[29] The benefits which the petitioners thus derived from the agreement are emphasized by the refusal of the trial judge in passing sentence in the tax evasion prosecution to consider any other offenses of which petitioners might be guilty. Otis, J., in passing sentence (see *United States* v. *Pendergast*, 28 F. Supp. 601, 605) said "When a defendant has been charged with a given crime and has entered a plea of guilty to that charge, the punishment assessed should be for the crime charged, and that only. If the crime charged is, as here, attempted tax evasion, the punishment should be for attempted tax evasion * * *."

[30] In this connection the opinion of Otis, J., in sentencing petitioners in the tax prosecution brought to their attention at a very early stage the possible consequences in store for them. Their continued silence on this score until entering the plea in bar to this prosecution does not support their present claim as to the breadth of the agreement. See remarks of Otis, J., in his opinion in this proceeding (R. 63–65). See also R. 1201.

Petitioners concede that their contention on this score does not present a sustainable plea in bar at law (Pet. Br. 50). The most that they can claim in this connection is equitable favor. That claim, on which the carefully limited punishment which they have received is relevant, is properly addressed to executive clemency. It presents no reason for reversing the judgment below.

## IV

### THE THREE-JUDGE DISTRICT COURT HAD JURISDICTION TO PASS UPON THE PRESENT CONTEMPT CHARGE

Jurisdiction of the three-judge court in the insurance rate litigation, sustained below (R. 1202–1206) is no longer in dispute (cf. *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331, 333; *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317, 320; *Oklahoma Natural Gas Co.* v. *Russell*, 261 U. S. 290, 292; *Herkness* v. *Irion*, 278 U. S. 92, 93–94).[31] Nor is there any question that the three-judge tribunal might properly condition its inter-

[31] The insurance rate cases here involved arose on applications by the insurance companies for interlocutory and permanent injunctions restraining enforcement of state statutes for alleged unconstitutionality. By their bills (on which the jurisdiction of the court is determined (*Mosher* v. *City of Phoenix*, 287 U. S. 29, 30; *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U. S. 315, 324)) the insurance companies sought "to forestall the demands of * * * [a] general state policy, the validity of which" they challenged. Cf. *Phillips* v. *United States*, 312 U. S. 246, 253. The Missouri statutes whose validity are assailed are set out in the Appendix.

locutory decree upon the impounding of the funds (cf. *City of Amarillo* v. *Southwestern Telegraph & Telephone Co.*, 253 Fed. 638, 640–641 (C. C. A. 5); *San Francisco Gas & Electric Co.* v. *City and County of San Francisco*, 164 Fed. 884, 893 (C. C. N. D. Cal.)) or that it had authority to order the subsequent distribution of the impounded funds (cf. *Public Service Commission of Missouri* v. *Brashear Freight Lines, Inc.*, 312 U. S. 621, 625; *Railroad Commission of California* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 391; *Sterling* v. *Constantin*, 287 U. S. 378, 393–394; *United States* v. *Morgan*, 307 U. S. 183, 193–194, 197–198). The contempt here thus arose in the course of a proceeding which was properly being conducted by the statutory court.

Petitioners contend, however, that the three judges were not authorized to pass on the contempt charges. They argue that the limited jurisdiction on the three-judge tribunal authorizes only the determination of questions expressly provided for in Section 266 of the Judicial Code (28 U. S. C., Section 380), and that the present proceeding involves a "separate offense" over which jurisdiction is not explicitly granted by that section.

However, even more clearly than its power to decide incidental substantive questions arising in litigation properly before it (cf. *Railroad Commission of California* v. *Pacific Gas & Electric Co.*, *supra*; *Sterling* v. *Constantin*, *supra*; and compare

*Public Service Commission of Missouri* v. *Brashear Freight Lines, Inc., supra*), the power of the three-judge court to provide for the proper conduct of its business, by contempt orders if necessary, is ancillary to whatever substantive jurisdiction it possesses. No express grant of such power is required; it follows with the creation of the court and the grant of substantive jurisdiction (cf. *United States* v. *Hudson*, 7 Cranch 32; see also *Anderson* v. *Dunn*, 6 Wheat. 204, 227–228; *Ex parte Terry*, 128 U. S. 289, 302–304). It is clear that federal courts may be restricted in the exercise of the contempt power;[22] and perhaps they may be totally deprived of the power by Congress. But this is not to be inferred from the failure to grant the power expressly, even to a court whose jurisdiction is as limited as the tribunal convened under Section 266 of the Judicial Code.

Any doubts as to the existence of the authority of the three-judge court to invoke summary punishment are resolved by reference to Section 268 of the Judicial Code. That section provides that "The courts of the United States shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority * * *." Its language embraces all courts of the United States whose jurisdiction is created by Congress (cf. *Ex parte Robinson*, 19 Wall.

[22] Cf. *Michaelson* v. *United States*, 266 U. S. 42; *Ex parte Grossman*, 267 U. S. 87, and compare *Bridges* v. *California*, 314 U. S. 252.

505, 510). And Congress has in no way excepted three-judge courts from among the grantees of this power.

It is thus beside the point to characterize the contempt as a "separate offense" or to urge that a contempt order is not appealable to this Court under Section 266 of the Judicial Code (cf. *Pendergast* v. *United States*, 314 U. S. 574). Neither proposition detracts from the authority of a federal court, convened pursuant to the provisions of Section 266 of the Judicial Code, to provide for the proper conduct of business before it and to punish summarily interferences with its business whether by tumult or otherwise.

In any event, even if the contempt charge was improperly passed upon by three judges, this did not invalidate the district court's judgment in the contempt proceeding. The participation of Judges Stone and Otis with Judge Reeves, who initially had jurisdiction of the insurance rate cases (R. 1155–1160) did not prejudice petitioners or invalidate the court's action (*Public Service Commission of Missouri* v. *Brashear Freight Lines, Inc.*, 312 U. S. 621; cf. *Healy* v. *Ratta*, 67 F. (2d) 554, 556 (C. C. A. 1); *Cannonball Transportation Co.* v. *American Stages, Inc.*, 53 F. (2d) 1050 (S. D. Ohio); and compare *Clark* v. *United States*, 61 F. (2d) 695 (C. C. A. 8), affirmed 289 U. S. 1 (where two judges sat in a contempt proceeding (p. 698) and the conviction was affirmed). Judge

Reeves, with Judge Stone and Judge Otis, heard and determined the contempt charge and rendered judgment thereon (R. 31; 32, 65–66, 74, 75, 145–146, 193–194, 232, 293–294, 346–348, 910, 919–924, 936, 1153, 1178–1179, 1184–1186). The three judges certified that the judgment and each ruling made in the contempt proceeding embodied their unanimous decision (R. 1154).

Petitioners' contention that the District Court for the Central Division of the Western District of Missouri did not have jurisdiction because Judge Collet was the only judge authorized to conduct that court is not well taken. At all times material herein Judge Reeves and Judge Otis have been, and are now, judges of the District Court for the Western District of Missouri, with full jurisdiction to preside in any division of that court. By Public Act No. 743, approved June 22, 1936 (49 Stat., p. 1804), the President was authorized to appoint one additional district judge for the Eastern and Western Districts; and Judge Collet was appointed as such additional district judge. He qualified as such and entered upon the discharge of his judicial duties on April 2, 1937. It will be noted that this was *nearly two years after* the beginning of petitioners' continuing contempt of court. It is obvious that in no event would Judge Collet have had jurisdiction to try petitioners for the contempt here involved.

The agreement between Judges Reeves, Otis and

Collet under 28 U. S. C., Sec. 27, for a division of the business of the Western District and the assignment of Judge Collet to the Central Division (R. 22), was a mere working division of business, and did not establish a limitation of jurisdiction or affect the jurisdiction of either Judge Reeves or Judge Otis to preside in the Central Division. *Ex parte Briggs*, 15 F. (2d) 84; *Johnson* v. *Manhattan Ry. Co.*, 61 F. (2d) 934, 938–939 (C. C. A. 2). Compare *McDowell* v. *United States*, 159 U. S. 596; *Ball* v. *United States*, 140 U. S. 118.

## CONCLUSION

We respectfully submit that the case was correctly decided below, and that the judgment should be affirmed.

CHARLES FAHY,
*Solicitor General.*

RICHARD K. PHELPS,
WILLIAM S. HOGSETT,
*Special Counsel and Amici Curiae.*

DECEMBER 1942.

## APPENDIX

Judicial Code:

> SEC. 268. *Administration of oaths; contempts.*—The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts (U. S. C., Title 28, Sec. 385).

Act of March 2, 1831, c. 99, 4 Stat. 487, provides:

> That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ

process, order, rule, decree, or command of the said courts.

SEC. 2. *And be it further enacted,* That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence.

Criminal Code, Section 135 (U. S. C., Title 18, Sec. 241).

Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or

both (R. S. §§ 5399, 5404; Mar. 4, 1909, c. 321, § 135, 35 Stat. 1113).

Following are the sections of the Revised Statutes of Missouri, 1919, which were challenged as unconstitutional by the insurance companies in the insurance rate cases (R. 382–399, 404–412, 420–421, 432, 436–437, 460–470, 472–475, 485–487, 490–497):

SEC. 6270. *Public rating record to be maintained—contents thereof—analysis of rate to be furnished policyholder.*—Every fire insurance company or other insurer authorized to effect insurance against the risk of loss by fire, lightning, hail or windstorm shall maintain a public rating record from which the rate of premium applicable to each risk in this state to be written by such company or other insurer may be ascertained in advance of the making of insurance thereon. Such rating records shall include, in so far as applicable, general basis schedule embodying basis rates, charges, terms, conditions, permits and standards, and such other data necessary to the computation or promulgation of equitable rates and rules of practice. Such records shall also show the forms and indorsements upon which each rate is predicated, and shall further show the changes of rate to be made on account of each and every change of form or indorsement. Such rating records shall be open to the inspection of the entire public and shall be maintained in such a form that the property owner can readily ascertain the rate charged on any class of property and the make-up of such rate. Every fire insurance company or other insurer authorized to effect insurance against the risk of loss by fire, lightning, hail or windstorm shall upon the

issuance of a policy furnish to the holder thereof a written or printed analysis of the rate or premium charged for such policy, showing the items of charge and credit which determine the rate. (Laws 1915, p. 313.)

* * * * * * *

SEC. 6274. *Public rating records to disclose correct rate—rates may be changed—notice of increase necessary—copies of all rating records to be filed.*—All public rating records required to be maintained by this article, whether kept by insurers separately or actuarial bureaus, shall show the rate which such insurer proposes to charge and collect, but any insurer maintaining its own public rating record, or any actuarial bureau shall be permitted to change or lower its rate or rates whenever it sees fit: *Provided*, that rates shall not be raised until at least ten days' notice has been given by the insurance company to the superintendent of insurance and his approval obtained, but in making a change it shall be required to make the change in writing on its public record, and to immediately give notice thereof to the superintendent of insurance. Changes of rate on account of physical hazard of any property, or on account of changes and improvements therein shall be immediately made when the facts warrant, and such change of rates shall become operative immediately when made. New or unrated risks may be written temporarily for a period of not exceeding sixty (60) days, within which period such risks shall be rated as provided herein, and policies of insurance covering such risks shall carry the rate so made from the beginning of the term of insurance. Copies of all public rating rec-

ords, whether kept by companies separately or actuarial bureaus, shall be filed with the superintendent of insurance not later than ninety days after the taking effect of this article, and notice of all changes made therein shall be immediately filed with the superintendent of insurance, and such public records and changes therein and modifications thereof shall be open to free public inspection and examination at all reasonable hours of each business day. (Laws 1915, p. 313.)

* * * * *

SEC. 6281. *Companies to report premiums, losses, expenses, and earnings on unearned premiums.*—Every stock fire insurance company licensed to do business in this state shall annually before March 1st of each year report to the superintendent of insurance the total amount of its premiums, losses and expenses for or on account of business in this state for the preceding year. In reporting expenses, it shall separately state its disbursements and expenses for:

(a) Commissions paid to agents.
(b) Salaries paid.
(c) Taxes paid.
(d) Other underwriting disbursements.

Each such company shall also report the total amount of its earnings on unearned premiums, and such other matters as the superintendent of insurance may require. And all insurance adjusters, whether employed regularly on a salary, or acting in the capacity of adjuster by special contract, for or on account of any fire insurance company, shall be considered an employe of said company and be subject to regulation and requirements of the fire insurance laws of Missouri as if they were

originally commissioned agents therefor. (Laws 1915, p. 313.)

* * * * *

SEC. 6283.[22] *Superintendent to investigate reasonableness of rates—may regulate rates charged.*—The superintendent of insurance, upon written complaint of any citizen, or upon his own motion, is hereby empowered to investigate the necessity for a reduction of rates. If, upon such investigation, it appears that the rates charged in this state by the stock fire insurance companies for the five years next preceding such investigation are producing a profit in excess of what is reasonable, he shall order such reduction of rates as will, in his opinion, produce a fair and reasonable profit only. Any such reduction ordered by the superintendent of insurance shall be applied by the companies, subject to his approval. If the companies do not, within thirty days, submit a classification, or classifications, which meet the approval of the superintendent of insurance, he shall apply such reduction in such manner as appears to him to be just and equitable. In determining the question of rates and profits, in accordance with this article, the superintendent of insurance shall give proper and reasonable consideration to the conflagration liability both within and without the state. He shall also take into consideration the acquisition cost and administration expense of such companies, and all earnings of such companies, including investment profits. He shall also consider whether or not the underwriting activities of such companies are conducted on a rea-

[22] As amended, Laws 1923, p. 235.

sonably economical basis, and whether or not their investments have been and are being made in a safe and reasonable manner, it being the intention of this section to provide that policyholders shall not be charged rates which will cover losses occasioned by extravagant methods or unsafe or speculative investment of funds.

* * * * *

SEC. 6287. *Penalties for violation.*—The superintendent of insurance, if he shall find that any insurance company or any officer, agent or representative thereof, has violated any provision of this article, may in his discretion revoke the license of such offending company, officer or agent, but the revocation of the said license shall in no manner affect the liability of such company, officer, agent or representative to the infliction of any other penalty provided by the laws of this state. Any fire insurance company or any director or officer thereof, or any agent or person acting for or employed by such company who, alone or with any other corporation, company or person, shall willfully do or cause to be done or shall willfully suffer or permit to be done any act, matter or thing in this article prohibited or declared to be unlawful, or who shall willfully suffer or permit any act, matter or thing in this article required to be done, or shall cause or willfully suffer or permit any act, matter or thing so directed by this article to be done, not to be done, or shall be guilty of any infraction of this article, shall be deemed guilty of a misdemeanor and shall upon conviction thereof be punished by a fine not to exceed five hundred dollars for each offense: *Provided*, that if the offense for which any person shall be convicted as aforesaid shall

be an unlawful discrimination, such person shall be punished by a fine of not to exceed five hundred dollars or by imprisonment in the county jail for a term not exceeding ninety days or by both such fine and imprisonment. (Laws 1915, p. 313.)

* * * * *

SEC. 6311. *Removal to or commencement of suit in federal court grounds for revocation of license—notice.*—If any foreign or nonresident insurance company, corporation, association or concern of any kind, including fraternal or beneficial associations or corporations and surety companies or corporations, organized and incorporated under the laws of any other state, territory or country, and doing business in this state under the laws of this state regulating and authorizing the licensing of any such company, corporation, association or concern by the superintendent of the insurance department of this state, shall, without the written consent, given and obtained after the filing of such suit or proceeding in the state court, of the other party to any suit or proceeding brought by or against it in any court of this state, whether suit or proceeding be pending in the state at the time of, or be brought after the taking effect of this section, remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, it shall be the duty of the superintendent of the insurance department to forthwith revoke all authority to such company, corporation, association or concern, and its agents, to do business in this state, and such company, corporation, association or concern shall not again be authorized or permitted to do business in this state at any

time within five years from the date of such revocation. And the superintendent shall publish such revocation in at least six newspapers of large and general circulation in the state: *Provided, however,* that the revocation of such authority shall not in any manner affect the duties and liabilities of any such company, corporation, association or concern under any policy or contract of insurance issued by it prior to and in force at the time of the revocation of such authority. (R. S. 1909, Sec. 7043.)

U. S. GOVERNMENT PRINTING OFFICE: 1942.

# SUPREME COURT OF THE UNITED STATES.

Nos. 183, 186, 187.—October Term, 1942.

Thomas J. Pendergast, Petitioner,
183 *vs.*
The United States of America.

Robert Emmet O'Malley, Petitioner,
186 *vs.*
The United States of America.

A. L. McCormack, Petitioner,
187 *vs.*
The United States of America.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[January 4, 1943.]

Mr. Justice Douglas delivered the opinion of the Court.

Petitioners, together with one Street now deceased, conceived and executed a nefarious scheme in fraud of the federal District Court and in corruption of the administration of justice. The short of it was that petitioners by fraud and deceit and through misrepresentations by attorneys induced the court to issue decrees effectuating a corrupt settlement of litigation. It happened this way:

Several insurance companies doing business in Missouri filed with the Superintendent of Insurance an increase in insurance rates which the Superintendent denied. The insurance companies filed over 130 separate injunction suits against the Superintendent and the Attorney General in the federal court to restrain the enforcement of certain statutes of Missouri on the ground of unconstitutionality. A three-judge court was convened which granted motions for interlocutory injunctions on July 2, 1930, whereby the Superintendent and the Attorney General were enjoined, pending final decision, from enforcing the Missouri statutes—on condition, however, that the insurance companies deposit the amount of increase in rates which was collected with a custodian of the court to await the final outcome of the litigation. In September 1930 a special master was appointed who held hearings. During this

time the premiums impounded by the court accumulated, until by 1936 they amounted to almost $10,000,000.

The lure of this sizeable amount of other people's money played an important part in the scheme which was hatched.

Street was in charge of the rate litigation for the insurance companies. Pendergast was a "political boss". O'Malley was the then Superintendent of Insurance. McCormack was an insurance agent. Of these only O'Malley was a party to the litigation. Street agreed to pay Pendergast a "fee" of $750,000 to use his influence over O'Malley and obtain a settlement of the litigation which would be satisfactory to the insurance companies. O'Malley was agreeable. McCormack was the go-between. Street made an initial payment of $100,000 in currency which was divided $55,000 to Pendergast, $22,500 to O'Malley, and $22,500 to McCormack. Thereafter an agreement was reached and reduced to writing in form of a memorandum. O'Malley would approve as of June 1, 1930, 80% of the increase in rates which the companies had sought; the parties would appear by their attorneys and join in seeking appropriate orders for distribution of the impounded money; 20% was to go to the policy holders, 50% directly to the insurance companies, and 30% to Street and another as trustees for the insurance companies. The latter were to account to the companies but not to the court or the Superintendent. The memorandum agreement was not disclosed to the court. But on June 18, 1935, the insurance companies filed in each case a motion reciting terms of settlement and praying for an order of distribution. On the next day the insurance companies and O'Malley filed stipulations agreeing that the court should make the order of distribution. Thereafter on June 22, 1935, October 26, 1935 and January 24, 1936, hearings were held in open court on the motions, and briefs were filed. Counsel, who were wholly innocent and acting in good faith, assured the court of the honesty, fairness, and desirability of the settlement. On February 1, 1936, the court acting in reliance on the representations and without a hearing on the merits entered a decree ordering distribution of the impounded funds as prayed in the motions. It also dismissed the bills, reserving jurisdiction, however, for certain purposes.

Petitioners then proceeded further with their corrupt plan. About April, 1936, Street paid $330,000 in currency of which Pendergast received $250,000, O'Malley $40,000 and McCormack $40,000. In the fall of 1936, Pendergast received another $10,000

in cash from Street. That left $310,000 of the $750,000 "fee" unpaid. And so far as appears it was never paid due to the unraveling of facts which led to an exposure of the entire corrupt scheme. For about that time an internal revenue investigation of Street's income tax return disclosed that over $400,000 of the funds for which Street was to account as trustee had been paid to unknown persons. This was reported to the Court in February 1939. A grand jury investigation followed in which the rest of the sordid story was unfolded. See *United States* v. *Pendergast*, 28 F. Supp. 601. The Department of Justice caused Pendergast and O'Malley to be indicted for evasion of income taxes on the amounts of money so received. They pleaded guilty and were fined and imprisoned late in May, 1939. *Id.* On May 29, 1939, O'Malley's successor filed a motion praying that the decrees of February 1, 1936, be set aside on the basis of those disclosures and that the insurance companies be ordered to restore the funds distributed to them. The court ordered the insurance companies to make restitution; and they did. At the same time the court asked the district attorney whether contempt proceedings should be filed. About a year passed when the court on May 20, 1940, requested the district attorney to institute contempt proceedings against petitioners. An information was filed July 13, 1940. Motions to abate and quash were overruled. 35 F. Supp. 593. Thereafter answers were filed and a hearing had. Petitioners were adjudged guilty of contempt—Pendergast and O'Malley being sentenced to two years' imprisonment and McCormack being sentenced to probation for two years. 39 F. Supp. 189. The Circuit Court of Appeals affirmed. 128 F. 2d 676. We granted the petition for certiorari because of the importance in the administration of justice of the problems raised.

Petitioners press several objections to the judgment below. The chief of these are that the offense was not a contempt under § 268 of the Judicial Code (28 U. S. C. 385) as construed by *Nye* v. *United States*, 313 U. S. 33, and that even though it was, the prosecution of it was barred by the three year statute of limitations contained in § 1044 of the Revised Statutes, 18 U. S. C. § 582. We do not reach the first of these questions and need not express an opinion on it. For although we assume *arguendo* that the Circuit Court of Appeals was correct in holding (128 F. 2d p. 683) that the conduct of petitioners was "misbehavior" in the "presence" of the court within the meaning of § 268 of the Judicial

Code and therefore punishable as a contempt, we are of the opinion that this prosecution was barred by § 1044 of the Revised Statutes.

That section provides: "No person shall be prosecuted, tried, or punished for any offense, not capital . . . unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed . . . ." It would seem that the statute fits this case like a glove. If the conduct in question was a contempt, there can be no doubt that it was a criminal contempt as defined by our decisions. See *Nye* v. *United States, supra,* pp. 41-43 and cases cited. As such it was an "offense" against the United States within the meaning of § 1044. It was held in *Gompers* v. *United States,* 233 U. S. 604, that a wilful violation of an injunction, likewise punishable as a contempt under § 268 of the Judicial Code, was such an "offense". And see *United States* v. *Goldman,* 277 U. S. 229. Cf. *Ex Parte Grossman,* 267 U. S. 87. It was said in the *Gompers* case that those contempts were "infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech." 233 U. S. p. 610. That observation is equally pertinent here. Moreover, we can see no reason for treating one type of contempt under § 268 of the Judicial Code differently in this respect from others under the same section. No such difference is discernible from the language of § 1044. Because of that and because of the further circumstance that Congress classified them together in defining the offense in § 268, we can hardly conclude that a distinction between them for purposes of § 1044 should be implied. Furthermore, the fact that this prosecution was by information, the absence of which has been held not fatal under § 1044 (*Gompers* v. *United States, supra,* pp. 611-612) brings the case squarely within the language of the section.

Certainly the power to punish contempts in the "presence" of the court, like the power to punish contempts for wilful violations of the court's decrees "must have some limit in time". *Gompers* v. *United States, supra,* p. 612. It is urged, however, that there is no limitation on prosecutions for contempts in the "presence" of the court except as one may be implied from the conclusion of the proceeding in which the contempt arises. But if we are free to consider the matter as open, no reason for that different treatment of contempts in the "presence" of the court is apparent.

*Adams* v. *Woods*, 2 Cranch 336, held that this statute of limitations was applicable to an action of debt for a penalty. Chief Justice Marshall stated that it would be "utterly repugnant to the genius of our laws" to allow such an action to lie "at any distance of time". *Id.*, p. 342. That observation is equally apt here. Proceedings like the rate litigation out of which this prosecution arose might well continue for years on end awaiting final disposition of all the funds. If there is a contempt, it takes place when the "misbehavior" occurs in the "presence" of the court. Statutes of limitations normally begin to run when the crime is complete. See *United States* v. *Irvine*, 98 U. S. 450. Every statute of limitations, of course, may permit a rogue to escape. Yet as Chief Justice Marshall observed in *Adams* v. *Woods*, *supra*, p. 342, "not even treason can be prosecuted after a lapse of three years". That was still true at the time of this offense. See R. S. § 1043, 18 U. S. C. § 581. There is no reason why this lesser crime, punishable without some of the protective features of criminal trials, should receive favored treatment.

But it is said that the contrary conclusion is to be inferred from *Gompers* v. *United States*, *supra*, because this Court took pains to point out that its ruling was applicable only to proceedings for contempt "not committed in the presence of the court." 233 U. S. p. 606. But that reservation, made out of an abundance of caution, also extended to "proceedings of this sort only" (*id.*, p. 606) *viz.* proceedings where no information was filed. *Ex parte Terry*, 128 U. S. 289, 314, sanctioned summary punishment for "direct contempts" committed in the "presence" of the court. The question whether that procedure could be followed "at a subsequent term, or at a subsequent day of the same term" was specifically reserved. *Id.*, p. 314. That is a procedural problem peculiar to direct contempts in the face of the court (see *Cooke* v. *United States*, 267 U. S. 517) and obviously has no relevancy to the problem of the statute of limitations.

The prosecution contends, however, that the offense consisted in the imposition of a fraudulent scheme upon the court, that successful execution of the scheme required not only misrepresentions to the court but continuous cooperation in concealing the scheme until its completion, that the fraud on the court would not be fully effected until 80% of the impounded funds was distributed to the insurance companies and $750,000 paid by Street and divided among petitioners. On that theory the fraudulent scheme, though

commenced before the three year period, continued thereafter. Accordingly, it is argued, by analogy to such cases as *United States* v. *Kissel*, 218 U. S. 601, 607-608; *Hyde* v. *United States*, 225 U. S. 347, 367-370; *Brown* v. *Elliott*, 225 U. S. 392, 400-401, that the statute of limitations began to run only after the latest act in the execution of the scheme. It is true that the information was drawn on the theory of such a continuing offense. But the difficulty with that theory lies in the nature of the offense described by § 268 of the Judicial Code.

That section, so far as material here, limits the power "to punish contempts" to cases of "misbehavior" in the "presence" of the court. If this was an ordinary criminal prosecution brought under § 135 of the Criminal Code (18 U. S. C. § 241) for "corruptly" obstructing "the due administration of justice", quite different considerations would govern. The fact that the acts were not in the "presence" of the court would be immaterial. And we may assume that a fraudulent scheme of the character of the present one would constitute a continuous offense under that section. We may also assume that certain "misbehavior" in the "presence" of the court might constitute an offense under § 135 of the Criminal Code as well as a contempt under § 268 of the Judicial Code, so as to give a choice between prosecution before a jury and prosecution before a judge. But the offense of "misbehavior" in the "presence" of the court does not have the sweep of "corruptly" obstructing or conspiring to obstruct "the due administration of justice". Congress restricted the class of offenses for which one may be tried without a jury. In the present case as in prosecutions for contempt for wilful violations of injunctions (*Gompers* v. *United States*, *supra*, p. 610) each act "so far as it was a contempt, was punishable as such" and therefore "must be judged by itself". As we have said, once the "misbehavior" occurs in the "presence" of the court, the crime is complete. It is conceded that but for the misrepresentations made to the court there would have been no "misbehavior" in its "presence" within the meaning of § 268 of the Judicial Code. And it is not claimed that there were any misrepresentations made to the court within three years of the filing of the information; or if May 29, 1939, the date when the court directed the inquiry, be deemed the important one (*Gompers* v. *United States*, *supra*, p. 608) there is no contention that any such misrepresentations were made within three years of that time. It is not fraud on the court which § 268

makes punishable as a contempt, unless that fraud is "misbehavior" in the "presence" of the court or "so near thereto as to obstruct the administration of justice". And, if the latter requirements are not met, the fact that the fraud may be "misbehavior" is not sufficient. The mere continuance of a fraudulent intent after an act of "misbehavior" in the "presence" of the court does not make that "misbehavior" a continuing offense under § 268. The misrepresentations to the court made possible, of course, the consummation of this nefarious scheme. But each subsequent step in that scheme did not constitute a contempt unless, like the misrepresentation itself, it was "misbehavior" in the "presence" of the court or "so near thereto as to obstruct the administration of justice". No such showing has been made here and none has been attempted. The fact that the scheme was fraudulent and corruptly obstructed the administration of justice does not enlarge the limited power to punish for contempt. It merely means that if petitioners can be punished, it must be through the ordinary channels of criminal prosecutions under the Criminal Code. We are forced to conclude that any contempt committed occurred not later than February 1, 1936, when the court ordered the distribution of the impounded funds. It was therefore barred by the statute of limitations.

*Reversed.*

Mr. Justice MURPHY took no part in the consideration or disposition of this case.

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Mr. Justice JACKSON, dissenting.

I do not agree that we should leave undecided the question whether conduct of this sort constitutes punishable contempt. To use bribery and fraud on the Court to obtain its order for disbursement of nearly $10,000,000 in trust in its custody is not only contempt but contempt of a kind far more damaging to the Court's good name and more subtly obstructive of justice than throwing an inkwell at a Judge, or disturbing the peace of a courtroom. I would hold the conduct of these petitioners to be "misbehavior" and within the "presence" of the Court and hence a contempt within the meaning of the statute. I should not deflect what

seems to be the course of practical and obvious justice in this case by resort to metaphysical speculations as to the effect of absence of the schemers from the courtroom when attorneys whom also they had deceived obtained the order from the Court.

Neither can I agree with the Court's conclusion that this contempt expired with the setting sun and the statute of limitation then began its work of immunizing these defendants. The fraud had as an object not merely to get the Court order, but to get the money from the Court's custody. The contempt and the fraud did not cease to operate so long as the money was being disbursed in reliance upon it, and by virtue of its concealment.

Hence, I find no good reason for interfering with the effort of the lower court to bring these men to account for their fraud on it.

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Mr. Justice FRANKFURTER.

I wholly agree with the conclusion of Mr. Justice JACKSON that the petitioners' conduct constituted a contempt within the meaning of Section 268 of the Judicial Code, 28 U. S. C. § 385. But I am also compelled to conclude, for the reasons stated in the opinion of the Court, that prosecution for such offense is barred by the applicable statute of limitations, R. S. § 1044, 18 U. S. C. § 582.